Supreme Court, U.S.
FILED
981355 JAN 5 - 1999
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1998

GERVASE MOCZYGEMBA AND IRA MOCZYGEMBA AND POTH LAND AND CATTLE CO., INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

LES MENDELSOHN
JUDITH SANDERS-CASTRO
Counsel of Record
LES MENDELSOHN & ASSOCIATES, P.C.
1100 Weston Centre
112 East Pecan
San Antonio, Texas 78205
(210) 222-2271 *telephone*
(210) 230-8914 *facsimile*

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

92pp

QUESTIONS PRESENTED FOR REVIEW

1. Does the Administrative Dispute Resolution Act create a statutory mediation privilege against non-disclosure of confidential communications made in federal agency mediations to third persons, including grand juries, unless a court finds that certain statutorily prescribed procedures are followed?

2. May a court refuse to apply the plain language of an Act of Congress requiring non-disclosure of confidential communications merely because it fears that to apply the law as written and intended by Congress might shield unspecified and undefined wrongdoing?

3. Does the United States Constitution protect thousands of federal agency mediation participants, who made confidential communications to mediators, from being compelled to become witnesses against themselves before a federal grand jury that subpoenaed all mediation communications?

4. Does the U.S. Constitution protect participants in federal mediations against government disclosure of dispute resolution communications or communications provided in confidence to a mediator where statutory disclosure safeguards are ignored by a court?

THE PARTIES TO THE PROCEEDINGS

Petitioners are Gervase Moczygemba, Ira Moczygemba, and Poth Land & Cattle Company, Inc., intervenors in the grand jury proceeding in the Northern District of Texas, Dallas Division and appellees in the United States Court of Appeals for the Fifth Circuit. Respondent is the United States of America.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

THE PARTIES TO THE PROCEEDINGS ii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. Overview of Issues 2

B. Congressional Plan for Alternative Dispute Resolution 3

C. Proceedings Below 4

Reasons for Granting the Writ 7

I. The Court of Appeals' Opinion Improperly Fails to Follow the Plain Meaning of the ADRA and Subverts the Purpose of Congress' Plan to Encourage Alternative Dispute Resolution of Federal Agency Disputes by Requiring Non-Disclosure of Confidential Communications in Mediation 9

A. Plain Meaning of Statute 9

B. Congress Intended for There to Be a Privilege 10

C. The Decision Below Conflicts with Prior Persuasive Authority 11

1. Mediation Privilege Recognized by Lower Federal Courts 11

TABLE OF CONTENTS – Continued

Page

2. Recognizing Mediation Privilege Serves the Public Good 12

D. The Decision Below Affects Thousands of Participants in Federal Agency Mediations 13

II. The Court of Appeals' Opinion Judicially Legislated an Exception to the ADRA Which Subverts Congressional Purpose 14

A. Purpose and Plain Meaning of ADRA Thwarted 14

B. Non-Disclosure Negated 15

III. The Court Below Compelled Petitioners to Become Witnesses Against Themselves Before the Grand Jury in Violation of the Fifth Amendment 17

IV. The Court Below Denied Petitioners Their Liberty and Property Interests Without Due Process of Law by Disclosing Their Confidential Mediation Documents to a Federal Grand Jury in Violation of the Procedures Mandated by the ADRA 20

A. ADRA Created a Constitutionally Protected Interest in Process Due Prior to Disclosure 20

B. Liberty Interests Denied 21

C. Property Interests Denied 23

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Bolling v. Sharpe, 347 U.S. 497 (1954) 20, 21

Davis v. Scherer, Fla., 468 U.S. 1226 (1984) 23

Folb v. Motion Picture Pension & Health Plan, 16 F.Supp. 2d 1164 (C.D.Cal. 1998).....11, 14

Hewitt v. Helms, 459 U.S. 460 (1983)..... 22

Hoffa v. United States, 341 U.S. 479 (1951) 19

Howard v. United States, 372 F.2d 294 (9th Cir.), *cert. denied*, 388 U.S. 915 (1967) 21

Ingraham v. Wright, 430 U.S. 651 (1977).....20, 22

In re Grand Jury Subpoena Dated December 17, 1996, 148 F.3d 487 (5th Cir. 1998).....6, 7, 17, 24

Jaffe v. Redmond, 518 U.S. 1 (1996).....10, 11

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) 21

Kastigar v. United States, 406 U.S. 441 (1972).....18, 19

Lassiter v. Department of Soc. Serv. of Durham Cty., 452 U.S. 18 (1981) 21

Lefkowitz v. Cunningham, 431 U.S. at 801 (1977)..... 19

Lefkowitz v. Turley, 414 U.S. 70 (1973)..... 18

Lynch v. Household Finance Corp., 405 U.S. 538 (1972) 21

McCarthy v. Arndstein, 266 U.S. 34 (1924)..... 18

Manness v. Myers, 419 U.S. 459 (1975) 19

Meyer v. Nebraska, 262 U.S. 390 (1923)..... 21

TABLE OF AUTHORITIES – Continued

Page

Miranda v. Arizona, 384 U.S. 436 (1966) 20

Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964) 19

Nguyen Da Yen v. Kissinger, 528 F.2d 1194 (9th Cir. 1975) 7

Olin v. Wakinhona, 467 U.S. 230 (1983) 22

Rhode Island v. Innis, 446 U.S. 301 (1980) 20

Sierra Club v. Glickman, 82 F.3d 106 (5th Cir. 1996) 23

Smith v. Smith, 154 F.R.D. 661 (N.D.Tex. 1994) 12

Swidler & Berlin v. United States, 524 U.S. ___, 118 S.Ct. ___, 141 L.Ed.2d 379 (1998) 12, 13

Trammell v. United States, 445 U.S. 40 (1980) 13

United States v. Beery, 678 F.2d 856 (10th Cir. 1982), *cert. denied*, 471 U.S. 1066 (1985) 22

United States v. De La Jara, 973 F.2d 746 (9th Cir. 1992) 16

United States v. Pelletier, 898 F.2d 297 (2nd Cir. 1990) 22

United States v. Zolin, 491 U.S. 554 (1989) 16

Wisconsin v. Constantineau, 400 U.S. 433 (1971) 21

Wolff v. McDonnell, 418 U.S. 539 (1974) 20

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V 1, 3, 17, 19, 21, 22

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Administrative Dispute Resolution Act of 1990, 5 U.S.C. §571 *et seq.* 3

5 U.S.C. §571 ..... 2, 6, 15

5 U.S.C. §572 2

5 U.S.C. §572(a) 15

5 U.S.C. §572(c) 3

5 U.S.C. §573 2

5 U.S.C. §574 ..... 2, 3, 6, 12, 13

5 U.S.C. §574(a) 3, 4, 6, 9, 11, 22

5 U.S.C. §574(b) 11

5 U.S.C. §574(e) 4, 6, 22

Agricultural Credit Act, 7 U.S.C. §5101 *et seq.* 3

7 U.S.C. §5101 ..... 2, 14

7 U.S.C. §5101(c)(3)(D) 3, 4, 6, 15

18 U.S.C. §6002 18

28 U.S.C. §1254(1) 1

42 U.S.C. §1320a-4 10

TEX. CIV. PRAC. & REM. CODE, §154.073 ..... 2, 3, 4

RULES

Rule 408, Fed. R. Evid. 11

Rule 501, Fed. R. Evid. 10, 11

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

S. Rep. No. 543, 101st Cong., 2d Sess. 1 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3931 ..... 10, 11, 13

Alternative Dispute Resolution and Settlement Encouragement Act, H.R. 2603, 105th Congress, 1998 13

PETITION FOR WRIT OF CERTIORARI

Gervase and Ira Moczygemba and the Poth Land and Cattle Company, Inc., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-12) is reported at 148 F.3d 487. The opinions of the district court (App. 13-20) and (App. 25-26) and of the magistrate court (App. 21-24) are unreported.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on July 27, 1998. Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc were denied by written order on October 7, 1998. (App. 27-28). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). This timely petition was filed within 90 days of the denial of rehearing with suggestion for rehearing en banc.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be

> deprived of life, liberty, or property, without due process of law; . . .

Federal and state statutes relied on herein are fully set forth in the Appendix, as follows: 5 U.S.C. §§571 (App. 36-38), 572 (App. 39-40), 573 (App. 41-42), 574 (App. 43-46), and 7 U.S.C. §5101 (App. 29-33) and TEX. CIV. PRAC. & REM. CODE, §154.073 (App. 34-35).

STATEMENT OF THE CASE

A. Overview of Issues.

This case concerns the extent to which a federal appeals court has constitutional authority to ignore and, thereby, abrogate a Congressional plan establishing a system of alternative dispute resolution (hereinafter "ADR") of claims or disagreements between federal agencies and citizens as an alternative to litigation and adversarial proceedings. In particular, where Congress has encouraged participation of federal agencies and citizens in ADR by federal statutes, the question is whether a federal court may judicially legislate a repeal of a confidentiality privilege created by Congress through statute (or, stated otherwise, explicit statutory language that confidential communications made during mediations shall not be disclosed to third parties in civil or criminal proceedings unless a court finds that certain statutorily prescribed procedures are followed). May a court disregard statutory requirements for a procedure to be followed before disclosure of confidential ADR communications through a grand jury process by concluding that the Government's interest in determining whether a crime has been

committed overrides following (1) the Congressional procedure for confidentiality of mediation proceedings and (2) the United States Constitution, Amendment V, protection that one may not be compelled to become a witness against himself or may not be deprived of liberty without due process of law, because the Government speculates that to follow the statutory procedure "may shield wrongdoing" that is unspecified and undefined?

B. Congressional Plan for Alternative Dispute Resolution.

When Congress enacted the Agricultural Credit Act, 7 U.S.C. §5101 *et seq.* (hereinafter "ACA") in 1987, it directed procedures for certification and use of state agency mediation programs which guaranteed confidentiality of mediation communication. 7 U.S.C. §5101(c)(3)(D). The Secretary of the U.S. Department of Agriculture (hereinafter "USDA") agreed to accept the non-disclosure provisions of the Texas Alternative Dispute Resolution statute, TEX. CIV. PRAC. & REM. CODE, §154.073 (hereinafter "Texas ADR Act").

Later, when Congress passed its own alternate dispute resolution act, the Administrative Dispute Resolution Act of 1990, 5 U.S.C. §571 *et seq.* (hereinafter "ADRA"), it supplemented the ongoing programs under the ACA with clear non-disclosure/confidentiality provisions but incorporated a process by which disclosure could be had. 5 U.S.C. §572(c). Section 574 is entitled "Confidentiality" and prescribes a procedure for disclosure of "any communication provided in confidence to the neutral . . . " 5 U.S.C. §574(a). Herein, both the

Government and the recipient of the subpoena, Texas Tech University (the mediation neutral), failed to comply with the process required for disclosure of the "dispute resolution communication." 5 U.S.C. §§574(a), (e).

The Texas Agricultural Mediation Program (hereinafter "TAM") was a state agricultural mediation program operated and administered by Texas Tech University in accordance with federal regulations and funded by the USDA through its agency, the Farm Service Agency (hereinafter "FSA," formerly Farmers Home Administration) under the ACA. It provided ADR services for farmers, the FSA, and other farmer creditors for resolving disputes over loans and credit problems. To qualify for funding, the Governor of the State of Texas had to certify among other things that the mediation sessions provided by TAM would be confidential as required by 7 U.S.C. §5101(c)(3)(D). The Governor certified the program as providing the required confidentiality under the Texas ADR Act, TEX. CIV. PRAC. & REM. CODE, §154.073. The mediation program at Texas Tech was in existence when the federal ADRA was enacted in 1990, supplementing the ACA procedures.

C. Proceedings Below.

Gervase and Ira Moczygemba participated in USDA sponsored mediation proceedings on behalf of themselves and their corporation, Poth Land & Cattle Company, Inc., in about 1994 in an effort to restructure farm financing received from or guaranteed by FSA. *See* App.

54-60. They were told by the TAM that the ADR proceedings were confidential by law, and signed agreements of confidentiality before proceeding. App. 50-53. They provided dispute resolution communications and communications in confidence to the mediator/neutral and concluded their mediation.

On October 7, 1996, the Government issued a grand jury subpoena returnable December 17, 1996, to the acting TAM Administrator and Director of Audit of Texas Tech University commanding the return of fourteen (14) categories of documents, of which nine (9) related directly to the mediation process. App. 47-49. On December 16, 1996, petitioners filed a motion to intervene in the grand jury proceedings and to quash the subpoena because a mediation privilege of confidentiality protected them from involuntary disclosure of their mediation records. All records were delivered to the grand jury by TAM on January 22, 1997, the day before the initial hearing on the motions before the United States Magistrate Judge.

The trial court on March 13, 1997, vacated a January 29, 1997 magistrate's order and held that there was a conflict between the confidentiality requirements in (1) the ADRA and (2) the Texas ADR Act adopted by USDA through the ACA, that the ADRA controlled, and that the mediation privilege of confidentiality protected the approximately 600 mediation files which were the subject of the grand jury subpoena. App. 13-20. It ordered the magistrate judge to conduct a hearing to determine whether the procedural protections of the ADRA were followed, to-wit: Whether the mediator made reasonable efforts to inform petitioners and others of the demand so

that they could defend themselves against disclosure, as required by §574(e) of the ADRA. App. 20.

After concluding that TAM did not notify petitioners, the magistrate judge entered an April 23, 1997 order quashing the grand jury subpoena. App. 21-24. On May 20, 1997, the district court approved the recommendations of the magistrate judge and entered a final appealable order. App. 25-26.

A Fifth Circuit panel on July 27, 1998, *In re Grand Jury Subpoena Dated December 17, 1996*, 148 F.3d 487 (5th Cir. 1998), reversed the trial court, holding that neither the ADRA, §574, nor the ACA, §5101(c)(3)(D), which also requires confidentiality in state-sponsored USDA mediations, applied where there was a grand jury investigation. The panel held that there was no mediation privilege or other right of confidentiality from disclosure to third parties in the criminal grand jury proceeding. Finally, the lower court ignored petitioners' Fifth Amendment right against being compelled to become witnesses against themselves before the grand jury or any right to the process they were due pursuant to 5 U.S.C. §574(a) or the Texas ADR Act.

The panel engaged in a torturous misanalysis of the ADRA's definitions, 5 U.S.C. §571, to conclude that because the grand jury proceedings did not involve "an issue in controversy" as defined by §571 between USDA and petitioners, *the statute did not apply*, so there was no protection from disclosure to a grand jury. *In re Grand*

Jury Subpoena Dated December 17, 1996, 148 F.3d at 492.[1] The panel misapplied a Ninth Circuit case that held that confidential information about Vietnamese "air-lifted" children was not privileged from disclosure to them.[2] *Ibid.* It concluded that mediation participants' confidentiality expectations would not be "severely compromised" by disclosure of confidential communications to a grand jury; none of these would be public unless, of course, the grand jury "found probable cause to believe a criminal offense had occurred" after considering the confidential communications, which was justified by the "public interest" in criminal justice administration because Congress did not intend to "shield wrongdoing . . . out of the . . . mediation process." *Id.* at 493. Effectively, the end justified the means.

REASONS FOR GRANTING THE WRIT

1. The Court should grant review to decide the important, undecided federal statutory question of whether the Congressional plan for alternative dispute resolution requires non-disclosure to a federal grand jury by a neutral of any dispute resolution communication or any communication provided in confidence to the neutral

---

[1] Under the nonsensical reasoning used by the court, the prohibitions against subsequent disclosure of mediation communications would never apply in any proceeding unless the parties involved in the later proceeding were the original parties to the mediation itself.

[2] *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194 (9th Cir. 1975). This holding would apply only if petitioners sought their own mediation records.

where the neutral is served with the compulsory process of a grand jury subpoena.

a. The decision below conflicts with the plain meaning of the language of §574 of the Administrative Dispute Resolution Act, which requires non-disclosure unless the neutral timely notifies the affected person of the request for the confidential communication and a proper court makes findings to permit disclosure, as required by statute.

b. The decision below conflicts with prior judicial authority recognizing a mediation privilege.

c. The decision below undermines the Congressional statutory plan for establishing a confidential and trustworthy alternate dispute resolution program to resolve federal agency disputes.

d. The decision below affects not only the 600 USDA participants in the Texas TAM Program, and the thousands of other USDA mediation participants, but also all persons who have mediated and will mediate a loan, credit or other dispute with other federal agencies, or be a party to federal district court litigation.

2. Review by the Court is necessary to decide an important question of Constitutional law that alternative dispute resolution participants may not be compelled to become witnesses against themselves by compulsory process, including a grand jury subpoena.

3. Review by this Court is necessary to decide whether the U.S. Constitution protects participants in alternative dispute resolution from involuntary disclosure of dispute resolution communications where a

trial court refuses to follow the procedure that is due the participants before ordering disclosure of privileged or otherwise confidential communications.

I.

The Court of Appeals' Opinion Improperly Fails to Follow the Plain Meaning of the ADRA and Subverts the Purpose of Congress' Plan to Encourage Alternative Dispute Resolution of Federal Agency Disputes by Requiring Non-Disclosure of Confidential Communications in Mediation

A. Plain Meaning of Statute.

Congress explicitly mandated that ADR communications are privileged and not subject to compulsory disclosure in 5 U.S.C. §574(a), in pertinent part as follows:

> (a) Except as provided in subsections (d)[3] and (e),[4] a neutral in a dispute resolution proceeding shall not . . . through compulsory process be required to disclose any dispute resolution communication or any communication provided in confidence to the neutral, unless –
>
> * * *
>
> (4) a court determines that such testimony or disclosure is necessary to –
>
> (A) prevent manifest injustice;
>
> (B) help establish a violation of law; or

---

[3] Agreement for voluntary disclosure permitted.

[4] Procedure required to notify party or non-party participant to oppose disclosure within 15 days of notice when demand for disclosure is made.

(C) prevent harm to the public health or safety,

of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.

B. Congress Intended for There to Be a Privilege.

Rule 501 of the Federal Rules of Evidence specifically recognizes privileges created by Act of Congress, although they are not enumerated, such as non-disclosure of Social Security personal medical records in the possession of the General Accounting Office. 42 U.S.C. §1320a-4. The legal standard this Court applies is that a privilege is justified where it serves "public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth," overriding "the general duty to give what testimony one is capable of giving" . . . "in the light of reason and experience." *Jaffe v. Redmond*, 518 U.S. 1, 9 (1996).

The need for the mediation privilege and the public good justifying the privilege were explicitly found by Congress. The legislative history of the ADRA details 220,000 cases filed in federal court in 1989, with the United States a party in more than 55,000, discusses the increased use of alternative methods to litigation in use in the private sector, and advocates the need for similar government-wide processes in the federal sector to reduce costs and provide efficiency and fairness in dispute resolution. S. Rep. No. 543, 101st Cong., 2d Sess. 1,

2-5, 8, *reprinted in* 1990 U.S.C.C.A.N. 3931, 3932-3935, 3938. By enacting the ADRA in 1990, Congress intended that it should provide "support for agency . . . ADR programs," . . . "resolve[ ] issues related to such matters as confidentiality . . . " and " . . . supplement – not replace or limit – existing dispute resolution practices and procedures." S. Rep. No. 543, *supra* at 2, *reprinted in* 1990 U.S.C.C.A.N. at 3932. "[R]ules to protect the confidentiality of ADR proceedings" were established in the statute "to enable parties to ADR proceedings to be forthcoming and candid, **without fear that frank statements may later be used against them**." S. Rep. 543, *supra* at 11, *reprinted in* 1990 U.S.C.C.A.N. at 3941 (emphasis added). This legislative intent is manifested in the plain language of the statute set out in 5 U.S.C. §574(a) and (b).

C. The Decision Below Conflicts with Prior Persuasive Authority.

1. Mediation Privilege Recognized by Lower Federal Courts.

Although the question herein has never been addressed other than by the Fifth Circuit below, the Central District of California in July 1998 found that a common law mediation privilege was justified and should be recognized in a private mediation because the " 'public good transcend[ed] the normally predominant principle of utilizing all rational means for ascertaining the truth.' " *Folb v. Motion Picture Pension & Health Plan*, 16 F.Supp. 2d 1164, 1171 (C.D.Cal. 1998) (citing *Jaffe v. Redmond*, 518 U.S. at 9). The court relied on Rules 408 and 501 of the Federal Rules of Evidence, *id.* at 1180, and considered that state mediation privileges would be

meaningless if not recognized by federal courts. *See also Smith v. Smith*, 154 F.R.D. 661, 670-71 (N.D.Tex. 1994) (confirming confidentiality status on a mediator who was subpoenaed to testify).

Absent in those cases, though, was a privilege created by statute, as in the case at bar. Herein, Congress in §574 of the ADRA directed non-disclosure unless specified findings were made by a trial court to allow disclosure, as with the attorney-client privilege. However, the statutory prerequisites for disclosure were ignored by the court below.

2. Recognizing Mediation Privilege Serves the Public Good.

Recently, the same tensions present here between protections afforded communications through privilege and the Government's demand for information in a grand jury proceeding were addressed in *Swidler & Berlin v. United States*, 524 U.S. ___, 118 S.Ct. ___, 141 L.Ed.2d 379 (1998). This Court recognized that the attorney-client privilege asserted serves broad purposes. In many respects, the purposes cited in the majority opinion by Justice Rehnquist, i.e., consultation on financial matters and problems arising in the course of doing business, are analogous to those purposes which Congress intended to provide for farmers and borrowers through mediation processes under the ACA and the ADRA. As noted in *Swidler*, these confidences generally "may not come close to any sort of admission of criminal wrongdoing . . . " *id.* at 387. Specifically, Justice Rehnquist found that existence of the privilege encouraging full and frank communication between the attorney and client and that "loss of

evidence caused by the privilege is justified in part that without the privilege, the client may not have made such communications in the first place." *Ibid.*

The same is true herein as to mediations. S. Rep. No. 543, *supra* at 11, *reprinted in* 1990 U.S.C.C.A.N. at 3941. Moreover, requiring the court of appeals below to follow the plain meaning of the ADRA's language, 5 U.S.C. §574, supports the admonition by the dissent, O'Connor, J., where she reminded that a privilege should not apply unless it "will serve a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.' *Trammell v. United States*, 445 U.S. 40, 50, 63 L.Ed.2d 186, 100 S.Ct. 906 (1980)." The public good is not only strict construction of Congressional directives, but also following Congressional purpose of promoting ADR. The decision below has a chilling effect on all future agency mediations where a factual misstatement or an innocently inaccurate document may lead to a federal prosecution.

D. The Decision Below Affects Thousands of Participants in Federal Agency Mediations.

The ADRA is applicable to every federal agency that establishes or uses alternative dispute resolution proceedings. Since 1988, the FSA of the USDA has used mediation in its various programs in 40,000 to 50,000 cases. The consistency of federal policy encouraging the use of alternative dispute resolution in lieu of litigation and providing for confidential protections is demonstrated by the passage of the Alternative Dispute Resolution and Settlement Encouragement Act, H.R. 2603, 105th

Congress, in 1998 which required district courts to adopt confidentiality protections for court mediation proceedings. Indeed, 49 of the 50 state legislatures and the District of Columbia have adopted some form of alternative dispute resolution that incorporates confidentiality protections. *Folb v. Motion Picture Industry Pension & Health Plan*, 16 F.Supp. 2d at 1179 (describing the Texas ADR statute as declaring ADR proceedings confidential and privileged from disclosure.) Thus, the public good of the privilege has been demonstrated.

II.

The Court of Appeals' Opinion Judicially Legislated an Exception to the ADRA Which Subverts Congressional Purpose

A. Purpose and Plain Meaning of ADRA Thwarted.

Is the purpose of the Texas[5] and federal ADR legislation to guarantee that confidential communications in mediations are not involuntarily disclosed in subsequent civil or criminal proceedings, promoted or thwarted by the opinion below? By allowing a federal grand jury access to mediation documents communicated in confidence of non-disclosure by mediation participants, the court below thwarts Congressional purpose. That purpose is manifested in the plain meaning of the statutory

---

[5] The Texas ADR statute is important because the ACA adopted the Texas ADR statute to supply the confidentiality requirement of 7 U.S.C. §5101. The ADRA supplemented that statute.

language requiring a court to make critical findings after a due process hearing; yet, it is ignored by the Fifth Circuit.

The Fifth Circuit panel engaged in a tortured translation of otherwise easy to understand definitions of Congressional language in 5 U.S.C. §571. Its agonizing analysis that the federal ADRA and the Texas ADR do not apply to mediation proceedings pursuant to the ACA because there is no "issue in controversy" between parties as specified in the ADRA in the grand jury proceeding confounds reason.

The court disregarded that the "issue in controversy" concerns **disclosure of mediation records derived from** a "dispute resolution proceeding for the resolution of **an issue in controversy**," as defined in 5 U.S.C. §572(a). But for the mediation records from "a dispute resolution proceeding" related to an "issue in controversy" arising out of a dispute concerning "an administrative program of an agency" (FSA of USDA), 5 U.S.C. §572(a), there would be no dispute between the Moczygembas and the U.S. before this Court. The records that the subpoena seeks were developed in a mediation process sponsored by the USDA, an agency of the federal Government, in which participants were **guaranteed** that the words spoken and the documents produced would not be disclosed involuntarily in a subsequent civil or criminal proceeding. 5 U.S.C. §574; 7 U.S.C. §5101(c)(3)(D).

B. Non-Disclosure Negated.

The Fifth Circuit's opinion, therefore, effectively negates an act of Congress. Through the ADRA, Congress

defined all exceptions to the non-disclosure privilege it intended and set out the process for judicial determination of them. The opinion below undermines clear public policy, chilling the use of dispute resolution proceedings with the threat of disclosure and criminal prosecution regardless of representations of confidentiality.

When it determined that the ADRA did not apply herein and that the truth seeking function of the grand jury trumped any interests in confidentiality guaranteed by the Government, the Fifth Circuit cut out of whole cloth an exception neither intended nor stated by Congress. It ignored the statutory process for allowing disclosure, and gave the Government carte blanche access to privileged information without any threshold showing of a factual basis adequate to support a good faith belief by a reasonable person that even an in camera review of the materials may yield evidence that establishes the exception's applicability. *United States v. De La Jara*, 973 F.2d 746, (9th Cir. 1992) (citing *U.S. v. Zolin*, 491 U.S. 554, 575 (1989)). Essentially, the Fifth Circuit just skipped the inconvenience of the statute and its plain language, ignored Congressional intent and created its own version of what the law should be in order to curb asserted, but unspecified and non-existent, "criminal" activity.

III.

The Court Below Compelled Petitioners to Become Witnesses Against Themselves Before the Grand Jury in Violation of the Fifth Amendment

The Congressionally intended wide-spread use of ADR is an important reason for this Court to give guidance as to the rights of participants against self incrimination. The decision below conflicts with many U.S. Supreme Court decisions that persons may not be compelled to become witnesses against themselves in that the Fifth Circuit compels each mediation participant, including petitioners, to disclose their statutorily guaranteed confidential communications to the grand jury. The panel's offhand determination that "due to the secrecy of the grand jury proceedings . . . the confidentiality of the Moczygembas' mediation sessions will not be severely compromised by disclosure of information relating to those sessions to the grand jury" and the interests of the Moczygembas' in confidentiality of those communications would only be compromised if an indictment was returned by the grand jury causing the information to then become public, ignores the rights afforded the Moczygembas (and other mediation participants) against self incrimination. *In re Grand Jury Subpoena Dated December 17, 1996,* 148 F.3d at 492-93. The panel confused "disclosure" with "publication."

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." The settled view of the United States Supreme Court is that the privilege protects the Moczygembas from involuntary

disclosure whether made in a criminal or civil proceeding. *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).[6]

This Court continued that the object of the Amendment was "to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime." (citations omitted.) *Ibid.*

The Moczygembas as targets or subjects of a criminal investigation may not be compelled to give testimony or present other evidence against themselves from the mediation process in which they were guaranteed that their disclosures would not be used in any subsequent civil or criminal proceeding, unless they are afforded immunity pursuant to 18 U.S.C. §6002 from use of the compelled testimony in evidence derived therefrom in subsequent criminal proceedings. *Kastigar v. United States*, 406 U.S. 441 (1972). Justice Powell speaking for the Court explained that the Fifth Amendment privilege:

---

[6] The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings. *McCarthy v. Arndstein*, 266 U.S. 34, 40, 45 S.Ct. 16, 17, 69 L.Ed. 158 (1924), squarely held that

> "[t]he privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant."

> . . . can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.

Id. at 444-45.[7]

Whether the underlying mediation process is considered to be pursuant to state or federal law, the Fifth Amendment protects petitioners against self incrimination. *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 (1964). Without the protection of the Fifth Amendment, if petitioners are compelled to answer, their answers are inadmissible against themselves in later criminal prosecutions. *Lefkowitz v. Cunningham*, 431 U.S. at 801, 805 (1977).

This Court has always broadly construed the Fifth Amendment protection to assure that no individual is compelled to produce documentary evidence which may later be used against him as an accused in a criminal action. *Manness v. Myers*, 419 U.S. 459, 461 (1975). The protection does not merely encompass evidence which may lead to a criminal conviction, but also includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution. *Hoffa v. United States*, 341 U.S. 479, 486 (1951).

---

[7] The Court held that without transactional or use immunity Kastigar could not be compelled to give verbal testimony or provide other evidence against himself.

No distinction is drawn between statements which are direct confessions and statements which amount to admissions of part or all of a potential criminal offense. The privilege against self incrimination protects the Moczygembas from being compelled to incriminate themselves in any manner. It does not distinguish degrees of incrimination. *Rhode Island v. Innis*, 446 U.S. 301, 302 n.5 (1980); *Miranda v. Arizona*, 384 U.S. 436, 476 (1966).

IV.

The Court Below Denied Petitioners Their Liberty and Property Interests Without Due Process of Law by Disclosing Their Confidential Mediation Documents to a Federal Grand Jury in Violation of the Procedures Mandated by the ADRA

A. ADRA Created a Constitutionally Protected Interest in Process Due Prior to Disclosure.

When the Executive Branch of Government tells mediation participants that their confidential communications will not be disclosed and when the Legislative Branch guarantees non-disclosure by statute, but provides a process due them if disclosure is necessary for a judicially determined greater good, it is up to the Judicial Branch to make the rest of Government live up to their word. Due process under the United States Constitution is the touchstone of individual protection against arbitrary actions of Government, *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), and protects both liberty and property interests of individuals. *Ingraham v. Wright*, 430 U.S. 651, 672-673 (1977). There is no categorical distinction between due

process afforded property interests and that afforded liberty interests. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). Both require the same protections, including notice and an opportunity to be heard before one may suffer grievous loss of any kind, even though not as serious as an actual criminal conviction. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) (citing *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951)).

The purpose of due process is to provide fundamental fairness, *see Lassiter v. Department of Soc. Serv. of Durham Cty.*, 452 U.S. 18 (1981), and adherence to fundamental principles of justice and fair play. *Howard v. United States*, 372 F.2d 294 (9th Cir.), *cert. denied*, 388 U.S. 915 (1967) (due process is denied where the procedure tends to shock the sense of fair play).

B. Liberty Interest Denied.

> Although the Court has not assumed to define "liberty" [within the Fifth Amendment to the Federal Constitution] with any great precision, that term is not confined to mere freedom from bodily restraint . . . [but] extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper Governmental objective.

Bolling v. Sharpe, 347 U.S. at 499-500. Liberty interests include the right to engage in lawful occupations, enter into contracts and generally enjoy an orderly pursuit of happiness by free men. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Among the historic liberties protected by the Fifth Amendment is the right to be free from, and obtain

judicial relief from, an unjustified intrusion on personal security. *Ingraham v. Wright*, 430 U.S. at 673.

Where statutory laws place substantial limitations on official discretion, a liberty interest is implicated. *Accord, Olin v. Wakinhona*, 467 U.S. 230, 249 (1983). Where a statute goes "beyond simple procedural guidelines" and uses "language of an unmistakenly mandatory character, requiring that certain procedures 'shall' be employed" Congress "has created a protected liberty interest." *Accord, Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983). Herein, the ADRA and the ACA limited Government discretion to disclosure of confidential communications. The ADRA states that the neutral shall make reasonable efforts to notify petitioners of the subpoena, 5 U.S.C. §574(e), and that the neutral shall not disclose ADR communications unless a court makes certain specified findings. 5 U.S.C. §574(a). Thus, Government agreed with petitioners to non-disclosure without notice and an opportunity to be heard before their property was subjected to grand jury scrutiny. Since their good names, personal security and contracts for farm credit were at stake, Congress established a liberty interest in the process they were due in the ADRA or the Texas ADR Act.

Moreover, where the Government has entered into agreement for use immunity of testimony, a deliberate, direct breach of that agreement in prosecution of the witness is a per se violation of the Fifth Amendment. *U.S. v. Pelletier*, 898 F.2d 297 (2nd Cir. 1990). Direct or derivative use in a grand jury proceeding of testimony from a civil proceeding where use immunity has been agreed by the Government is a violation of due process. *Id.* at 303 (citing *United States v. Beery*, 678 F.2d 856, 860 & n.3 (10th

Cir. 1982), *cert. denied*, 471 U.S. 1066 (1985)). Herein, the Government has breached its statutory "agreements," implicating a liberty interest that was violated.

C. Property Interest Denied.

Property interests arise from state laws, contracts or mutually explicit understandings. *Davis v. Scherer, Fla.*, 468 U.S. 1226 (1984). Property interests broadly cover all character of property, including all things over which a person may have dominion or control or right of use or benefit. Persons who contract with the USDA, or have an entitlement to contract in the future with the agency, have "legally protectable interests." *Sierra Club v. Glickman*, 82 F.3d 106 (5th Cir. 1996). Through the mediation process petitioners had secured financing and credit agreements with and guaranteed by the Government, allowing them to continue operation of their farming business. Not only were their legally protectable property interests subjected to interference without due process, but they were also investigated for criminal wrongdoing without notice, intruding on their personal security, as a result of the court's determination to disclose the confidential mediation communications to the grand jury.

Only by arbitrarily and capriciously ignoring both the liberty and property interests of the individuals **and** the due process procedure contained in the statute could

the appellate court disclose the confidential mediation communications to the grand jury.[8]

CONCLUSION

This petition for writ of certiorari should be granted. This case would serve to define the parameters of the actions of the Government when mediations are held, so that participants have notice of their rights, and the Government has a clear understanding of its obligations to those it invites or requires to participate in mediation processes. This case may also serve to clarify public policy regarding the use and expanding role of alternative dispute resolution in our society.

Respectfully submitted,

LES MENDELSOHN
JUDITH SANDERS-CASTRO
Counsel of Record
LES MENDELSOHN & ASSOCIATES, P.C.
1100 Weston Centre
112 East Pecan
San Antonio, Texas 78205
(210) 222-2271 [*telephone*]
(210) 230-8914 [*facsimile*]

Counsel for Petitioners

January 5, 1999

---

[8] In its opinion, the lower court specifically recognized that the ADRA provided procedural safeguards. *In re Grand Jury Subpoena Dated December 17, 1996*, 148 F.3d at 493. It just inexplicably refused to apply them here.

In re: GRAND JURY SUBPOENA
DATED DECEMBER 17, 1996.

No. 97-10507

United States Court of Appeals
Fifth Circuit.

July 27, 1998.

Madeleine Brinton Johnson, Dallas, TX, for Plaintiff-Appellant.

Leslie Stephen Mendelsohn, Judith A. Sanders-Castro, San Antonio, TX, for Movants-Appellees.

David Cohen, Austin TX, for Alternative Dispute Resolution Section of the State of Texas, Amicus Curiae.

D. Gene Valentini, Lubbock, TX, for Texas Dispute Resolutions, Directors Council, Amicus Curiae.

Wes Sims, Waco, TX, for Texas Farmers Union, Amicus Curiae.

Appeal from the United States District for the Northern District of Texas.

Before KING and DAVIS, Circuit Judges, and VANCE*, District Judge.

W. EUGENE DAVIS, Circuit Judge:

The Government appeals an order of the district court quashing a grand jury subpoena served on the custodian of records of the Texas Agricultural Mediation

---

*District Judge of the Eastern District of Louisiana, sitting by designation.

Program ("TAM"), a state agricultural loan mediation program operated and administered by Texas Tech University, to the extent the subpoena sought documents relating to mediation proceedings involving appellees Gervase and Ira Moczygembas and the Poth Land and Cattle Company (collectively, the "Moczygembas"). The district court ruled that such documents are protected from disclosure to the grand jury by a federal mediation privilege. For the reasons set out below, we reverse and remand.

I.

TAM is a state agricultural loan mediation program that receives federal funding under the Agricultural Credit Act of 1987, Pub.L.N. 100-233. The Agricultural Credit Act was passed in response to the growing problem of farm debt in the United States. Among other things, the Act provides for financial assistance to states for the operation and administration of agricultural loan mediation programs to assist in resolving disputes between farmers and their agricultural lenders. *See* 7 U.S.C. § 5102. To qualify for financial assistance, a state must obtain certification from the Secretary of Agriculture. *See* 7 U.S.C. § 5101(a). The Secretary will certify a state for qualification if the state has in effect an agricultural loan mediation program that, among other things, "provides that mediation sessions shall be confidential[.]" *See* 7 U.S.C. § 5101(c)(3)(D).

The state of Texas has received financial assistance for the operation and administration of TAM since 1988. Its proposal for certification provided that TAM would be

operated in accordance with the confidentiality provisions of the Texas Alternative Dispute Resolution Procedures Act (referred to herein as the "Texas ADR statute"), Tex. Civ. Prac. & Rem. Code §§ 154.001 *et seq.* The Texas ADR statute provides that "a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure . . . is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding." *See* Tex. Civ. Prac. & Rem. Code §§ 154.073(a). However, if this provision "conflicts with other legal requirements for disclosure of communications or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure." § 154.073(d).

In 1995, during the course of an audit of TAM, the Office of Investigator General ("OIG") of the United States Department of Agriculture ("USDA") discovered a number of irregularities and began to suspect criminal wrongdoing. The OIG's suspicions eventually led to a grand jury investigation of TAM. In November 1996, a grand jury subpoena was served on TAM's custodian of records. On December 16, 1996, one day before the return date of the subpoena, the Moczygembas moved to intervene and quash the subpoena on the ground that documents relating to mediation proceedings involving them are protected from disclosure by a mediation privilege.

[1] The district court referred the matter to a magistrate judge. Before a hearing was held, Texas Tech fully complied with the subpoena and turned over documents relating to various mediation proceedings, including those involving the Moczygembas. The magistrate judge subsequently denied the Moczygembas' motion on the ground that federal law does not recognize a mediation privilege. The Moczygembas appealed the magistrate's denial to the district court, which held that the documents were protected from disclosure by a federal mediation privilege and vacated the magistrate's order. On remand, after making further findings as instructed by the district court, the magistrate judge entered an order quashing the subpoena to the extent it sought documents relating to mediation proceedings involving the Moczygembas. The district court denied the Government's appeal of the magistrate's order. The Government appeals that decision, which is final under 28 U.S.C. § 1291. *See In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 913 F.2d 1118, 1122 (5th Cir. 1990) (order quashing grand jury subpoena is final decision under 28 U.S.C. § 1291); *In re Grand Jury Subpoena*, 646 F.2d 963, 968 (5th Cir. 1981) (same).

II.

[2] Before turning to the merits of this appeal, we quickly dispose of two arguments raised by the Government concerning the district court's exercise of jurisdiction in this case. First, the Government contends that the Moczygembas lacked standing to challenge the grand jury subpoena because the subpoena because the subpoena was not directed at them, nor did they have a

possessory interest in the documents requested. This contention is without merit. A third party has standing to challenge a grand jury subpoena where the third party has a claim of privilege respecting information or materials sought by the subpoena. *See In re Grand Jury,* 111 F.3d 1066, 1073-74 (3d Cir. 1997); *In re Grand Jury Proceedings,* 814 F.2d 61, 66 (1st Cir. 1987); *In re Subpoenas to Local 478, Int'l Union of Operating Engineers and Benefit Funds,* 708 F.2d 65, 66 (2d Cir. 1983). Because the Moczygembas raised a claim of privilege respecting the documents at issue, they had standing to challenge the subpoena.

[3] The Government also contends that the Moczygembas' motion to quash the subpoena was moot by the time the district court ruled that the documents were privileged because by then Texas Tech had fully complied with the subpoena and the documents had been turned over to the grand jury. This contention also lacks merit. A motion to quash a grand jury subpoena is not moot even though documents have been produced in compliance with the subpoena and turned over to the grand jury because a court can still grant a party some relief by ordering the return or destruction of the documents produced. *See in re Grand Jury Subpoenas Duces Tecum,* 78 F.3d 1307, 1310-11 (8th Cir. 1996); *In re Grand Jury Subpoenas Dated December 7 and 8,* 40 F.3d 1096, 1100 (10th Cir. 1994); *see also Church of Scientology of California v. United States,* 506 U.S. 9, 13, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992) (appeal of summons issued by IRS not moot even though tapes sought by summons had been produced because court could render partial relief by ordering the return or destruction of the tapes).

III.

We turn now to the merits of this appeal. The Government argues that the district court erred in recognizing a federal mediation privilege that protects documents relating to mediation proceedings involving the Moczygembas from disclosure to the grand jury. The Moczygembas argue that the district court correctly recognized and applied a mediation privilege created by Congress. In ruling that the documents are protected from disclosure, the district court relied on three separate statutory schemes: 1) the Agricultural Credit Act; 2) the Texas ADR statute; and 3) the Alternative Dispute Resolution Act ("ADRA"), 5 U.S.C. § 571 *et seq.*, a federal statue that authorizes federal agencies to use alternative dispute resolution proceedings to resolve certain disputes. The court first observed that the Agricultural Credit Act, at 7 U.S.C. § 5101(c)(3)(D), requires state agricultural loan mediation programs to provide that "mediation sessions shall be confidential" in order to qualify for federal funding. Because Texas represented that TAM would be operated in accordance with the confidentiality provisions of the Texas ADR statute and TAM was certified accordingly, the district court concluded that the Texas ADR statute "supplies the federal law of privilege in this case."

As set out above, the Texas ADR statute provides that "a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure . . . is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding." *See* Tex. Civ. Prac. & Rem. Code

§ 154.073(a). However, if this provision "conflicts with other legal requirements for disclosure of communications or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure." § 154.073(d).

The district court determined that the statute's nondisclosure provision was in conflict with the ADRA, which provides that "information concerning any [mediation] communication" may be disclosed if a court determines that such disclosure is necessary to help establish certain violations of law. *See* 5 U.S.C. § 574(a)(4)(B). Relying on 5 U.S.C. § 574(e)[1], the court concluded that before a court balances the equities to make such a determination in a particular case, the mediator must make reasonable efforts to notify the parties involved who must be given 15 days to offer to defend a refusal of the mediator

---

[1] 5 U.S.C. § 574(e) provides:

> If a demand for disclosure . . . is made upon a [mediator] regarding a dispute resolution communication, the [mediator] shall make reasonable efforts to notify the parties . . . of the demand. Any party who . . . receives such notice and within 15 calendar days does not offer to defend a refusal of the [mediator] to disclose the requested information shall have waived any objection to such disclosure.

to disclose the requested information. The court also concluded, relying on 5 U.S.C. § 574(c)[2], that materials disclosed in violation of the ADRA's nondisclosure provisions are inadmissible in any proceeding relating to the issues in controversy with respect to which the communication was made. Because the district court was unable to determine from the record whether the Moczygembas were notified of the service of the grand jury subpoena on TAM but failed to offer to defend a refusal to comply within 15 days of receiving such notice, the court referred the matter to the magistrate judge, instructing the magistrate judge to grant the Moczygembas' motion to quash if TAM had not made reasonable efforts to notify the Moczygembas of the service of the subpoena. The magistrate ultimately determined that TAM had not done so and granted the motion to quash.

[4-6] We review the district court's statutory interpretation *de novo*. *See Spacek v. Maritime Ass'n*, 134 F.3d 283, 288 (5th Cir. 1998). We begin by observing that neither the Texas ADR statute nor the ADRA has any application in this case. The district court determined that the Texas ADR statute "supplies the federal law of privilege in this case" because § 5101(c)(3)(D) requires states

---

[2] 5 U.S.C. § 574(c) provides:

> Any dispute resolution communication that is disclosed in violation of subsection (a) or (b), shall not be admissible in any proceeding relating to the issues in controversy with respect to which the communication was made.

to provide that mediation sessions shall remain "confidential" and Texas represented that TAM's mediation sessions would be kept confidential in accordance with the Texas ADR statute's confidentiality provisions. However, nothing in § 5101(c)(3)(D) or the Agricultural Credit Act's other provisions concerning state agricultural loan mediation programs suggests that the meaning of "confidential" is determined by resort to other sources.[3]

[7] The district court also concluded that the Texas ADR statute's nondisclosure provisions conflicted with the ADRA. The ADRA allows an "agency" to "use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program." *See* 5 U.S.C. § 572(a). "Agency" is defined as "each

---

[3] The Moczygembas do not argue that the Texas ADR statute in and of itself creates an evidentiary privilege that should be recognized in federal court. Rule 501 of the Federal Rules of Evidence governs the applicability of evidentiary privileges in federal court. Rule 501 provides that "[e]xcept as otherwise required by the Constitution of the United States or provided by an act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority," and except "with respect to an element of a claim or defense as to which State law supplies the rule of decision," the recognition of privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." When a party seeks to assert a privilege that does not exist at common law but is enacted by a state legislature, this court determines whether to recognize the privilege by "balancing the policies behind the privilege against the policies favoring disclosure." *American Civil Liberties Union of Mississippi, Inc. v. Finch*, 638 F.2d 1336, 1343 (5th Cir. 1981). The Moczygembas have not argued that a mediation privilege exists at common law or that recognition of the privilege created by the Texas ADR statute is warranted.

authority of the Government of the United States," subject to certain exclusions. *See* 5 U.S.C. §§ 551(1), 571(1). An "issue in controversy" means "an issue to which is material to a decision concerning an administrative program of an agency, and with which there is disagreement" either "between an agency and persons who would be substantially affected by the decision" or "between persons who would be substantially affected by the decision." *See* 5 U.S.C. § 571(8)(A), (B). There is no such "issue in controversy" involved in this case.

[8] Accordingly, we are left to determine whether documents relating to mediation proceedings involving the Moczygembas are privileged and protected from disclosure to the grand jury under the Agricultural Credit Act. To reiterate, 7 U.S.C. § 5101(c)(3)(D) requires a state agricultural loan mediation program to provide that mediation sessions shall be confidential in order to qualify for federal funding. In imposing this requirement, Congress obviously sought to protect information relating to mediation sessions to some extent. Confidentiality is critical to the mediation process because it promotes the free flow of information that may result in the settlement of a dispute. *See, e.g.*, Kenneth R. Feinberg, *Mediation – A Preferred Method of Dispute Resolution*, 16 Pepp. L.Rev. S5, S28-29 (1989). In the absence of clear congressional intent to the contrary, however, we do not read § 5101(c)(3)(D) as creating an evidentiary privilege that protects information relating to mediation sessions from disclosure in grand jury proceedings. Section 5101(c)(3)(D) requires only that mediation sessions

remain "confidential."[4] "Confidential" does not necessarily mean "privileged." *See, e.g., Nguyen Da Yen v. Kissinger,* 528 F.2d 1194, 1205 (9th Cir. 1975) (concluding that records were confidential but not privileged); *State v. Thompson,* 54 Wash.2d 100, 338 P.2d 319, 322 (1959) (holding that requirement of confidentiality in statute did not create evidentiary privilege); *see also American Civil Liberties Union of Mississippi v. Finch,* 638 F.2d 1336, 1342 (5th Cir. 1981) (assuming *arguendo* that confidentiality requirement in statute created evidentiary privilege). In the ADRA, by contrast, Congress explicitly provided that, subject to certain exceptions, a mediator "shall not voluntarily disclose or through discovery or compulsory process be required to disclose any information concerning any dispute resolution communication or any communication provided in confidence" to the mediator. *See* 5 U.S.C. § 574(a).

[9] Because privileges are not lightly created, *United States v. Nixon,* 418 U.S. 683, 710, 94 S. Ct. 3090, 41 L.Ed.2d 1039 (1974), we will not infer one where Congress has not clearly manifested an intent to create one. Thus, we hold that § 5101(c)(3)(D) does not protect documents relating to mediation proceedings involving the Moczygembas from disclosure to the grand jury. We observe, however, that due to the secrecy of grand jury proceedings, *see* Fed. R. Crim. P. 6(e), the confidentiality of the Moczygembas' mediation sessions will not be severely compromised by the disclosure of information

---

[4] We received the legislative history of the Act but did not come across any discussion concerning this confidentiality requirement.

relating to those sessions to the grand jury. Of course, if the grand jury returns an indictment, such information may become public. In returning an indictment, however, a grand jury indicates that it has found probable cause to believe that a criminal offense has occurred. We are satisfied that Congress did not intend that § 5101(c)(3)(D) be used to shield wrongdoing arising out of the state agricultural loan mediation process. Indeed, even the ADRA provides for disclosure where a court determines that disclosure is necessary to "help establish a violation of law . . . of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential." *See* U.S.C. § 574(a)(4)(B). Thus, if an indictment is returned, any interest the Moczygembas have in the confidentiality of their mediation sessions will have to give way to the public interest in the administration of criminal justice.

IV.

For the reasons set out above, we conclude that the district court erred in ruling that documents relating to mediation proceedings involving the Moczygembas are privileged and protected from disclosure to the grand jury. We therefore reverse and remand this matter for further proceedings consistent with this opinion.

REVERSED and REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:

GRAND JURY SUBPOENA,

No. 3:96-MC-0112-T
(UNDER SEAL)

ORDER VACATING ORDER OF MAGISTRATE JUDGE

AND

REFERRING CASE FOR FURTHER CONSIDERATION

Before the Court is the Intervenors' Motion to Reconsider Magistrate Judge's Failure to Quash Grand Jury's Subpoena Duces Tecum and Motion for Protective Order. The Court construes this as an appeal from the Magistrate Judge's order denying Intervenors' motion for protective order. After considering the appeal, the response, and the record in this case, the Court is of the opinion that the order of the Magistrate Judge should be vacated and the case referred for further consideration.

On January 23, 1997, United State Magistrate Judge Boyle conducted a hearing on the Motion to Intervene in Grand Jury Proceedings and to Quash a Subpoena Duces Tecum filed by Gervase and Ira Moczygemba and Poth Land & Cattle Company. The subpoena for the production of certain documents was served on the Custodian of Records for the Texas Agricultural Mediation Program of Texas Tech University. The Magistrate Judge ruled that

federal law does not recognize a mediation privilege and denied the motion to intervene and to quash.

With the present appeal, the movants contend, as they did before the Magistrate Judge, that the documents subject to the subpoena are privileged and not subject to disclosure because they relate to confidential communications made in the course of the mediation. They rely on various provisions of the United States Code. *See* 5 U.S.C. § 574 (confidentiality of alternative dispute resolution proceedings); 7 U.S.C. § 5101(c)(4) (confidentiality of state agricultural loan mediation programs).

In response to the appeal, the Government contends that: (1) federal law does not recognize a mediation privilege; (2) there is no authority in the Fifth Circuit that supports a mediation privilege in the context of a criminal proceeding; and (3) the Government is not required to reveal the purpose of its investigation in an evidentiary proceeding to justify the grand jury subpoena.

A district court may designate a magistrate judge to hear and determine nondispositive pretrial matters. 28 U.S.C. § 636(b)(1)(A). The district court shall not reverse, vacate, or modify, an order entered by the Magistrate Judge unless the order is based on factual findings which are clearly erroneous, legal conclusions which are contrary to law, or rulings which amount to an abuse of discretion. *Smith v. Smith*, 154 F.R.D. 661, 665 (N.D. Tex. 1994). In this case, the Court determines that the order of the Magistrate Judge is contrary to law.

The creation of new privileges are disfavored. *In re Dinnan*, 661 F.2d 426 (5th Cir. 1981). As such, privileges must be strictly construed "only to the very limited

extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." *Trammel v. United States*, 445 U.S. 40, 49 (1980). Thus, where there is not compelling justification for a new privilege, the vital truth seeking function of our justice system must carry the day. *See United States v. Nixon*, 418 U.S. 683, 710 (1974). Nevertheless, in this case, the Court determines that Congress recognizes the importance of the privilege urged by the movants.

The Agricultural Credit Act of 1987, Pub. L. No. 100-233, created a statutory scheme which authorizes the Department of Agriculture to establish target participation rates to ensure that members of socially disadvantaged groups will receive loans to acquire DOA-held farmland. 7 U.S.C. § 2003(a)(1); *Moore v. Dep't of Agriculture*, 55 F.3d 991, 992 (5th Cir. 1995). Part of the statutory scheme provides for the creation of state agricultural loan mediation programs to assist borrowers and the Farmers Home Administration of the United States Department of Agriculture (USDA-FmHA) in reaching mutually agreeable solutions to delinquency problems. *See* 7 U.S.C. § 5001. To be certified for participation by USDA-FmHA, state agricultural mediation programs are required to provide for the confidentiality of the mediation process. *See* 7 U.S.C. § 5101(c)(4).

In this case, the movants provide evidence, which the Government does not dispute, that Texas designated Texas Tech University as the state agency to administer the agricultural loan mediation program in Texas. Texas Tech developed a proposal for what later became known

as the Texas Agriculture Mediation Program (TAM). The proposal provided that the program would operate under the Texas Alternative Dispute Resolution Statute to provide for the confidentiality of the mediation process. *See* TEX. CIV. PRAC. & REM. CODE § 154.073. This proposal was approved by USDA-FmHA, and TAM became a certified state agricultural program which qualified for federal matching-funds.

As Congress requires that the states establish procedures that ensure that the mediation sessions shall be confidential, and the Secretary has certified that the TAM program meets the statutory requirements, the Court determines that the Texas statute supplies the federal law of privilege in this case.

The Texas statute provides that unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may not be disclosed to anyone, including the appointing court. TEX. CIV. PRAC. & REM. CODE § 154.053(c). Further, except as provided in subsections (c) & (d), a communication relating to the subject matter of any criminal or civil dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceedings. Id. at § 154.073. Further, the mediator shall not be required to disclose confidential information or data relating to or arising out of the subject matter in dispute. *Id.* at § 154.073.

Subsection (c) provides that an oral communication or written material used in or made a part of an alternative dispute resolution procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure. TEX. CIV. PRAC. & REM. CODE § 154.073(c). Subsection (d) provides that if this section conflicts with other legal requirements for disclosure of communications or materials, the issue of confidentiality may be presented to a court of competent jurisdiction to determine, in camera, whether the facts, circumstances, and context of the communications or material sought to be disclosed justify a protective order or are subject to disclosure. *Id.* at § 154.073(d).

The Court notes that the Texas statute is not inconsistent with the federal law governing mediations involving federal agencies. Congress authorizes federal agencies to use alternative dispute resolution proceedings, including mediation, for the resolution of issues in controversy that relate to an administrative program. *See* 5 U.S.C. § 572(a). A federal mediator is considered to be a "neutral," who may not have an official, financial, or personal conflict of interest with respect to the issues in controversy, unless such conflict is disclosed in writing to all parties and all parties agree that the neutral may serve. *See id.* at 573(a) & (b).

During mediation, information is deemed disclosed "in confidence" if it is disclosed with the express intent of the source that it not be disclosed or under circumstances that would create a reasonable expectation on behalf of the source that the information will not be disclosed. 5 U.S.C. § 571(7). Neutrals shall not voluntarily disclose or *through discovery or compulsory process be required to*

disclosed any information concerning any dispute resolution communication provided in confidence to the neutral, except in limited circumstances. *See id.* at 574(a). Thus, Congress recognizes the importance of confidentiality to the integrity of the mediation process when federal agencies are parties to the mediation.

As stated above, the Texas statute provides that confidential information may be disclosed if the non-disclosure requirement is in conflict with another statute. The Court determines that, in this case, § 574 (a)(4) of the federal statute conflicts with the non-disclosure provisions of the Texas Statute.

Section 574(a)(4)(B) provides that disclosure of confidential material is appropriate when a court of competent jurisdiction determines that disclosing the information is *necessary* to help establish a significant violation of law and that the importance of disclosing the information outweighs jeopardizing the integrity of the dispute resolution proceedings in general by reducing the confidence of parties in the future that their communications will remain confidential. 5 U.S.C. § 574(a)(4)(B).

Before the court balances the needs of the particular case against the integrity of the system, however, the mediator must notify the parties and any affected non-party participants of the demand and the interested party must object. *Id.* at § 574(e). Any party or affected non-party participant who receives notice of the subpoena is afforded 15 days to offer to defend a refusal of the neutral to disclose the requested information, and the failure to offer to defend within this period constitutes waiver of any objection. *See id.* Materials disclosed in violation of

subsection (a) *shall not be admissible in any proceeding* relating to the issues in controversy with respect to which the communication was made. *Id.* at § 574(c).

In the Government's initial response, filed January 22, 1997, it represents that this action is moot because, "[s]ince the time of service of the subpoena, Texas Tech has been fully cooperative and has in all respects complied with the subpoena." this indicates that the documents may have been produced in violation of § 574(a)(4); however, the Court cannot determine from the record whether the movants were properly notified pursuant to § 574(a) but failed to offer to defend within the 15-day period. Therefore, the Court deems it necessary to refer this case to the Magistrate Judge for hearing, if necessary, and determination of whether the right to object to the production has been waived.

If the Magistrate Judge finds that the mediator failed to give the required notice of the subpoena before turning over the documents, or that the movants offered to defend the mediator within 15 days of receiving notice of the subpoena, then the Magistrate Judge should grant the motion for protective order and order the documents returned to the movants. *See Church of Scientology of California v. United States*, 509 U.S. 9, 12-13 (1992); *F.T.C. v. Gibson Products of San Antonio, Inc.*, 569 F.2d 900, 903 (5th Cir. 1978); *Atlantic Richfield Co., v. F.T.C.*, 546 F.2d 646, 650-51 (5th Cir. 1977). Otherwise, the Magistrate Judge should deny the motion to quash. *See* 5 U.S.C. § 574(e).

As a final matter, the Court recognizes that the grand jury has always been extended extraordinary powers of investigation and great responsibility for directing its

own efforts. *United States v. Schell Engineering, Inc.*, 463 U.S. 418, 423 (1982). Nevertheless, its power is not unlimited. *United States v. Calandra*, 414 U.S. 338, 346 (1974). It may consider incompetent evidence, but it may not itself violate a valid privilege, whether established by the Constitution, statute, or the common law. *Id.*

It is therefore **ORDERED** that the Magistrate Judge's Order filed January 29, 1997, is **vacated**.

It is **FURTHER ORDERED** that this miscellaneous action is **referred** to the United States Magistrate Judge Boyle for hearing, is necessary, and determination consistent with this opinion.

Signed this 13th day of March, 1997.

/s/ Robert B. Maloney
Robert B. Maloney
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	)	MISC. NO. 3:96-MC-112-T
GRAND JURY SUBPOENA	)	FILED UNDER SEAL

ORDER

On April 15, 1997, the undersigned Magistrate Judge conducted a hearing to determine whether the mediator gave the movants notice required by 5 U.S.C. Section 574(e). The parties, United States (government), on the one hand, and Gervase Moczygemba, Ira Moczygemba and Poth Land and Cattle Company, Inc. (movants), on the other, appeared by counsel and announced ready. The district court previously declared that the documents subject to the subpoena are privileged and not subject to disclosure because they relate to confidential communications made in the course of the mediation in question. Therefore, the burden shifts to the government to establish that movants were properly notified of the existence of the subpoena pursuant to 5 U.S.C. Section 574(e) but failed to offer to defend within the fifteen (15) day period provided therein. The court considered the evidence presented and the arguments of counsel and finds that the government has failed to meet its burden of proof. It is, therefore,

ORDERED, ADJUDGED and DECREED by the court, as follows:

1. There is no evidence or, alternatively, insufficient evidence, that the neutral, acting

through its' agents or employees, made reasonable efforts to notify movants of the subpoena;

2. Movants did not receive notice of the existence of the Grand Jury Subpoena at any time after it was issued on November 4, 1996, from any then-existing agent or employee of Texas Tech University or the Texas Agricultural Mediation Program;

3. Movants did not receive notice of the existence of the Grand Jury Subpoena more thean fifteen (15) calendar days before movants offered to defend the refusal of the neutral to disclose the requested information by filing herein their motion to intervene and to quash the Grand Jury Subpoena on December 16, 1996;

4. All mediation documents relating in any way to Gervase Moczygemba, Ira Moczygemba or Poth Land and Cattle Company, Inc. shall be turned over to movant Gervase Moczygemba;

5. The demand made by the government, that is the Grand Jury Subpoena to Custodian of Records, D. Kent Kay, acting Texas Agricultural Mediation Program Administrator and Director of Internal Audit at Texas Tech University for the return of documents on December 17, 1996, is, pursuant to the order of the district court dated March 13, 1997, quashed as it pertains to Gervase Moczygemba, Ira Moczygemba and Poth Land and Cattle Company, Inc.;

6. The government is ordered to turn over the mediation documents relating to movants,

within ~~five (5)~~ ten calendar days from the date that this order is signed by delivering the same, postage pre-paid to Mr. Les Mendelsohn, 112 E. Pecan St., Suite 1100, San Antonio, Texas 78205-1533, counsel for movants; mediation documents being all documents delivered to the government by the custodian of records, D. Kent Kay, acting Texas Agricultural Mediation Program Administrator and Director of Internal Audit at Texas Tech University in response to the Grand Jury Subpoena in question; and

7. This order directing the government to so turn over the mediation documents, referred to in paragraph 6, is stayed until ten (10) days after this order is signed, within which time the government will have an opportunity to present evidence to the court that the neutral did, in fact, give movants the notice provided in 5 U.S.C. Section 574(e), after which the court will schedule a hearing regarding such evidence, if any.

Signed the 23rd day of April, 1997.

/s/ JANE J. BOYLE
UNITED STATES
MAGISTRATE JUDGE

APPROVED AS TO FORM:

PAUL E. COGGINS
United States Attorney

By: /s/ _____
MADELEINE B. JOHNSON
Assistant United States Attorney

ATTORNEYS FOR THE UNITED STATES

MENDELSOHN & JACKSON, P.C.

By: /s/ LES MENDELSOHN
LES MENDELSOHN

ATTORNEYS FOR MOVANTS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:

GRAND JURY SUBPOENA,

No. 3:96-MC-0112-T
[UNDER SEAL]

ORDER REGARDING ANSWER TO APPEAL

(Filed May 20, 1997)

On May 12, 1997, the movants in this miscellaneous action filed their Answer to Appeal from Order of Magistrate Boyle Quashing Grand Jury Subpoena. The answer states that there may be some confusion regarding the status of this case for appeal, and the movants "prefer to try the issue of privilege and waiver to the court of appeals at one time rather than to litigate procedural questions of the finality of the order from which the appeal is taken.

The confusion stems from the Government's filing of a motion for reconsideration on the one day after the Court denied the Government's motion to stay pending appeal. The order stated that the Court considers the issues in this case to be final and appealable. After receiving the Court's order, the Government, by telephone, informed the Court that it would withdraw the motion for reconsideration and appeal the matter directly to the

Fifth Circuit Court of Appeals. Apparently, the order and the Government's motion crossed paths in the night.

For clarification, there are no live issues left in this case. The Court deems all orders entered to be final and appealable. Any relief requested which has not alreadly been ruled on by the Court is **denied**.

It is **SO ORDERED**.

Signed this 20th day of May, 1997.

/s/ Robert B. Maloney
Robert B. Maloney
U.S. District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-10507

In Re: Grand Jury Proceedings

Appeals from the United States District Court
for the Northern District of Texas, Dallas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 7/27/98, 5 Cir., ___, ___ P.3d ___)

(Filed Oct. 7, 1998)

Before KING and DAVIS, Circuit Judges, and VANCE, *District Judge.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED.R.APP.P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

---

*District Judge of the Eastern District of Louisiana, sitting by designation.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge

7 U.S.C. § 5101

QUALIFYING STATES

(a) In general

A State is a qualifying State if the Secretary of Agriculture (hereinafter in this chapter referred to as the "Secretary") determines that the State has in effect a mediation program that meets the requirements of subsection (c) of this section.

(b) Determination by Secretary

Within 15 days after the Secretary receives from the Governor of a State a description of the mediation program of the State and a statement certifying that the State has met all of the requirements of subsection (c) of this section, the Secretary shall determine whether the State is a qualifying State.

(c) Requirements of State mediation programs

(1) Issues covered

To be certified as a qualifying State, the mediation program of the State must provide mediation services for the persons described in paragraph (2) who are involved in agricultural loans or agricultural loans and one or more of the following issues under the jurisdiction of the Department of Agriculture:

(A) Wetlands determinations.

(B) Compliance with farm programs, including conservation programs.

(C) Agricultural credit.

(D) Rural water loan programs.

(E) Grazing on National Forest System lands.

(F) Pesticides.

(G) Such other issues as the Secretary considers appropriate.

(2) Persons eligible for mediation

The persons referred to in paragraph (1) are producers, their creditors (if applicable), and other persons directly affected by actions of the Department of Agriculture.

(3) Certification conditions

The Secretary shall certify a State as a qualifying State with respect to the issues proposed to be covered by the mediation program of the State if the mediation program –

(A) provides for mediation services that, if decisions are reached, result in mediated, mutually agreeable decisions between the parties to the mediation;

(B) is authorized or administered by an agency of the State government or by the Governor of the State;

(C) provides for the training of mediators;

(D) provides that the mediation sessions shall be confidential;

(E) ensures, in the case of agricultural loans, that all lenders and borrowers of agricultural loans receive adequate notification of the mediation program;

and

(F) ensures, in the case of other issues covered by the mediation program, that persons directly affected by actions of the Department of Agriculture receive adequate notification of the mediation program.

7 U.S.C. § 5101

QUALIFYING STATES

(a) In general

A State is a qualifying State if the Secretary of Agriculture (hereinafter in this chapter referred to as the "Secretary") determines that the State has in effect an agricultural loan mediation program that meets the requirements of subsection (c) of this section.

(b) Determination by Secretary

Within 15 days after the Secretary receives from the Governor of a State, a description of the agricultural loan mediation program of the State and a statement certifying that the State has met all of the requirements of subsection (c) of this section, the Secretary shall determine whether the State is a qualifying State.

(c) Requirements of State programs

Within 15 days after the Secretary receives a description of a State agricultural loan mediation program, the Secretary shall certify the State as a qualifying State if the State program –

(1) provides for mediation services to be provided to producers, and their creditors, that, if decisions are reached, result in mediated, mutually agreeable decisions between parties under an agricultural loan mediation program.

(2) is authorized or administered by an agency of the State government or by the Governor of the State;

(3) provides for the training of mediators;

(4) provides that the mediation sessions shall be confidential; and

(5) ensures that all lenders and borrowers of agricultural loans receive adequate notification of the mediation program.

TEXAS CIVIL PRACTICE AND REMEDIES CODE § 154.073

CONFIDENTIALITY OF COMMUNICATIONS IN DISPUTE RESOLUTION PROCEDURES

(a) Except as provided by Subsections (c) and (d), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

(c) An oral communication or written material used in or made a part of an alternative dispute resolution procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure.

(d) If this section conflicts with other legal requirements for disclosure of communications or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a

protective order of the court or whether the communications or materials are subject to disclosure.

SUBCHAPTER IV – ALTERNATIVE MEANS OF DISPUTE RESOLUTION IN THE ADMINISTRATIVE PROCESS

5 U.S.C. § 571

DEFINITIONS

For the purposes of this subchapter, the term –

(1) "agency" has the same meaning as in section 551(1) of this title;

(2) "administrative program" includes a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rule making, adjudication, licensing, or investigation, as those terms are used in subchapter II of this chapter;

(3) "alternative means of dispute resolution" means any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, factfinding, minitrials, arbitration, and use of ombuds, or any combination thereof;

(4) "award" means any decision by an arbitrator resolving the issues in controversy;

(5) "dispute resolution communication" means any oral or written communication prepared for the purposes of a dispute resolution proceeding, including any memoranda, notes or work product of the neutral, parties or nonparty participant; except that a written agreement to enter into a dispute resolution proceeding, or final written agreement or arbitral award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication;

(6) "dispute resolution proceeding" means any process in which an alternative means of dispute resolution is used to resolve an issue in controversy in which a neutral is appointed and specified parties participate;

(7) "in confidence" means, with respect to information, that the information is provided –

(A) with the expressed intent of the source that it not be disclosed; or

(B) under circumstances that would create the reasonable expectation on behalf of the source that the information will not be disclosed;

(8) "issue in controversy" means an issue which is material to a decision concerning an administrative program of an agency, and with which there is disagreement –

(A) between an agency and persons who would be substantially affected by the decision; or

(B) between persons who would be substantially affected by the decision;

(9) "neutral" means an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy;

(10) "party" means –

(A) for a proceeding with named parties, the same as in section 551(3) of this title; and

(B) for a proceeding without named parties, a person who will be significantly affected by the decision in the proceeding and who participates in the proceeding;

(11) "person" has the same meaning as in section 551(2) of this title; and

(12) "roster" means a list of persons qualified to provide services as neutrals.

5 U.S.C. § 572

GENERAL AUTHORITY

(a) An agency may use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding.

(b) An agency shall consider not using a dispute resolution proceeding if –

(1) a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;

(2) the matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency;

(3) maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions;

(4) the matter significantly affects persons or organizations who are not parties to the proceeding;

(5) a full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; and

(6) the agency must maintain continuing jurisdiction over the matter with authority to

alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the agency's fulfilling that requirement.

(c) Alternative means of dispute resolution authorized under this subchapter are voluntary procedures which supplement rather than limit other available agency dispute resolution techniques.

5 U.S.C. § 573

NEUTRALS

(a) A neutral may be a permanent or temporary officer or employee of the Federal Government or any other individual who is acceptable to the parties to a dispute resolution proceeding. A neutral shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve.

(b) A neutral who serves as a conciliator, facilitator, or mediator serves at the will of the parties.

(c) The President shall designate an agency or designate or establish an interagency committee to facilitate and encourage agency use of dispute resolution under this subchapter. Such agency or interagency committee, in consultation with other appropriate Federal agencies and professional organizations experienced in matters concerning dispute resolution, shall –

(1) encourage and facilitate agency use of alternative means of dispute resolution; and

(2) develop procedures that permit agencies to obtain the services of neutrals on an expedited basis.

(d) An agency may use the services of one or more employees of other agencies to serve as neutrals in dispute resolution proceedings. The agencies may enter into an interagency agreement that provides for the reimbursement by the user agency or the parties of the full or partial cost of the services of such an employee.

(e) Any agency may enter into a contract with any person for services as a neutral, or for training in connection with alternative means of dispute resolution. The parties in a dispute resolution proceeding shall agree on compensation for the neutral that is fair and reasonable to the Government.

5 U.S.C. § 574

CONFIDENTIALITY

(a) Except as provided in subsections (d) and (e), **a neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication or any communication provided in confidence to the neutral**, unless –

(1) all parties to the dispute resolution proceeding and the neutral consent in writing, and, if the dispute resolution communication was provided by a nonparty participant, that participant also consents in writing;

(2) the dispute resolution communication has already been made public;

(3) the dispute resolution is required by statute to be made public, but a neutral should make such communication public only if no other person is reasonably available to disclose the communication; or

(4) a court determines that such testimony or disclosure is necessary to –

(A) prevent a manifest injustice;

(B) help establish a violation of law; or

(C) prevent harm to the public health or safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.

(b) **A party to a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication**, unless –

(1) the communication was prepared by the party seeking disclosure;

(2) all parties to the dispute resolution proceeding consent in writing;

(3) the dispute resolution communication has already been made public;

(4) the dispute resolution communication is required by statute to be made public;

(5) a court determines that such testimony or disclosure is necessary to –

(A) prevent a manifest injustice;

(B) help establish a violation of law; or

(C) prevent harm to the public health and safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential;

(6) the dispute resolution communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award; or

(7) the dispute resolution communication was provided to or was available to all parties to the dispute resolution proceeding.

(c) Any dispute resolution communication that is disclosed in violation of subsection (a) or (b), **shall not be admissible in any proceeding** relating to the issues in controversy with respect to which the communication was made.

(d)(1) The parties may agree to alternative confidential procedures for disclosures by a neutral. Upon such agreement the parties shall inform the neutral before the commencement of the dispute resolution proceeding of any modifications to the provisions of subsection (a) that will govern the confidentiality of the dispute resolution proceeding. If the parties do not so inform the neutral, subsection (a) shall apply.

(2) To qualify for the exemption established under subsection (j), an alternative confidential procedure under this subsection may not provide for less disclosure than the confidential procedures otherwise provided under this section.

(e) If a demand for disclosure, by way of discovery request or other legal process, is made upon a neutral regarding a dispute resolution communication, the neutral shall make reasonable efforts to notify the parties or affected nonparty participant who receives such notice and within 15 calendar days does not offer to defend a refusal of the neutral to disclose the requested information shall have waived any objection to such disclosure.

(f) Nothing in this section shall prevent the discovery or admissibility of any evidence that is otherwise discoverable, merely because the evidence was presented in the course of a dispute resolution proceeding.

(g) Subsections (a) and (b) shall have no effect on the information and data that are necessary to document an agreement reached or order issued pursuant to a dispute resolution proceeding.

(h) Subsections (a) and (b) shall not prevent the gathering of information for research or educational purposes, in cooperation with other agencies, governmental entities, or dispute resolution programs, so long as the parties and the specific issues in controversy are not identifiable.

(i) Subsections (a) and (b) shall not prevent use of a dispute resolution communication to resolve a dispute between the neutral in a dispute resolution proceeding and a party to or participant in such proceeding, so long as such dispute resolution communication is disclosed only to the extent necessary to resolve such dispute.

(j) A dispute resolution communication which is between a neutral and a party and which may not be disclosed under this section shall also be exempt from disclosure under section 552(b)(3).

[LOGO]
Texas Agricultural Loan Mediation Program
1212 13th Street, Suite 200
Lubbock, Texas 79401
(806) 744-0138
FAX: (806) 744-0134

AGRICULTURAL LOAN DISPUTE

Waiver and Consent Form

We, the undersigned parties, have executed this Waiver and Consent in exchange for participation by the Texas Agricultural Loan Mediation Program (TALM[1]) in the mediation of our loan dispute. This Waiver and Consent relates only to the matters arising during the mediation process of that dispute.

1. We understand that the Mediator is not a legal or tax advisor and that he/she is not permitted to provide legal or tax advice to any party involved in the mediation process. We also agree to hold the Mediator harmless for any observations, suggestions or implications he/she may make in the course of this meeting. We expressly agree to individually obtain legal or tax advice from our own attorneys and/or accountants and not to rely upon the Mediator for such advice.

2. We waive any right to action that we may have against the Mediator for any allegations of wrongful conduct during the course of this meeting of the creditors and the mediation process. Nor shall any employee or contractor of TALM be liable to any

---

[1] References to TALM (i.e., the Texas Agricultural Loan Mediation Program) include Texas Tech University. Likewise, references to any of these organizations include the entity itself, its employees, and its subcontractors.

party for any act or omission in connection of this loan dispute.

3. We agree that our participation in the mediation of this dispute will be governed by Title 7 of the Texas Civil Practice and Remedies Code dealing with Alternative Dispute Resolution Procedures.

4. We further agree and understand that under state law[2], communications in the mediation process are confidential, subject to the following conditions:

(a) Except as provided by Subsections (c) and (d), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

(c) An oral communication or written material used in or made a part of an alternative dispute resolution procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure.

(d) If this section conflicts with other legal requirements for disclosure of communications or materials,

---

[2] Texas Civ. Prac. & Rem. Code Ann. Section 154.073 (Vernon Pamph. Supp. 1988).

the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to the disclosure.

5. We specifically agree and understand that any written settlement agreement executed in this meeting is enforceable in the same manner as any other written agreement.

6. We further agree that no employee or contractor of TALM will be named as a party or called as a witness in judicial proceedings relating to the mediation of this loan dispute.

We consent to these terms and waive the rights herein specified, if any; and we know that we have the right to consult legal counsel before executing this document. We also understand that our signatures sanction the meeting scheduled for this _____ day of _____, 19 ___.

_____	_____
Signature of Party	Date
_____	_____
Signature of Party	Date
_____	_____
Signature of Party	Date
_____	_____
Signature of Party	Date
_____	_____
Signature of Party	Date

Signature of Party	Date
Signature of Party	Date
Signature of Party	Date

Farm Service Agency
Online

Fact Sheet
Electronic Edition

[LOGO]

June 1998

Agricultural Mediation Program

Section 502 of the Agricultural Credit Act of 1987 (P.L. 100-233) authorized the Secretary of Agriculture to help States develop the Department of Agriculture's (USDA) Certified State **Mediation** Programs and participate in those programs. The Farm Service Agency (FSA) through the Advisory and Corporate Operations Staff administers the program.

State **mediation** programs assist agricultural producers, their creditors, and other persons directly affected by the actions of the USDA to resolve disputes, thereby reducing participants' costs associated with administrative appeals, litigation, and bankruptcy. The USDA **Mediation** Program gives farmers and ranchers a confidential way to work out distressed or delinquent loans.

Agricultural **mediation** is a way of settling disputes within a producer's own means. The program provides a neutral mediator who can sit down with the parties or work on the phone to resolve very problematic issues. Instead of years it can take for a case to filter through the courts, **mediation** generally takes only a few meetings to complete.

A critical feature of **mediation** is confidentiality in working out differences concerning farmers and ranchers' business operations. **Mediation** documents are not to be used for any other legal action. This is one of the key requirements for State **mediation** certification. Confidentiality is the key to making **mediation** work.

Background

The Agricultural Credit Act of 1987 authorized an appropriation of $7,500,000 for each of the fiscal years (FY) 1988 through 1991, with matching grants limited to the lesser of 50 percent or $500,000 each year of the cost of any State program. Actual appropriations have been less than the authorization.

The Food, Agriculture, Conservation and Trade Act of 1990 (P.L. 101-624) extended this authority through FY 1995. The Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994 (P.L. 103-354) further extended this authority through FY 2000.

The Agriculture Credit improvement Act of 1992 (P.L. 102-554) raised the matching grant level from 50 to 70 percent. Section 282 of the 1994 Reorganization Act expanded the program to include wetland determinations, conservation compliance, agricultural credit, rural water loan programs, grazing on national forest system lands, pesticides, and other issues the Secretary deems appropriate.

Section 275 of the Act required that if a USDA Certified State **Mediation** Program is available as part of the informal hearing process, the appeal participant will be offered **mediation**.

What is Mediation?

Mediation is a process in which a trained, impartial person – a mediator – helps people look at their mutual problems, identify and consider options, and determine if they can agree on a solution. A mediator has no decision-making authority. Unlike a judge or an arbitrator, a mediator cannot decide what is right or "make" anyone do anything. Successful **mediation** is almost always based on the voluntary cooperation and participation of all the parties.

USDA enters **mediation** to explore all available options to help agricultural producers, their creditors, and other persons directly affected by the actions of USDA to resolve disputes and reduce costs associated with administrative appeals, litigation, and bankruptcy. USDA representatives try to set a positive, constructive tone and encourage others to do the same in order to provide a positive atmosphere for good settlements.

How Does Mediation Work?

Mediation can be requested by any affected party at any time, but it usually takes place after a USDA official advises the USDA customer that **mediation** is available before formal adverse action. The customer may request **mediation** or waive the opportunity to use the service.

If **mediation** is requested, State **mediation** officials contact the requesting party to get a complete list of potential participants and their addresses and suggest steps the participants should take to prepare for **mediation**. The

mediation service then assigns one or more mediators to the case.

Participants may select or eliminate the mediators offered by the **mediation** service. Once a mediator is selected, all potential participants are advised that a **mediation** process is underway. If a meeting is scheduled, the parties are informed of the time, place, and nature of the **mediation** process. Ground rules are set to ensure that the conference is productive.

Once an agreement is reached, the mediator makes sure that it is in writing, is signed, and made available to all participants. If an agreement is not reached, the case is closed, all parties are advised of the outcome, and all remain free to pursue other legal courses. **Mediation** does not favor one side or the other, but helps both consider their situation. The main idea is to provide a low-cost alternative to expensive, lengthy litigation or bankruptcy.

Certification of State Mediation Programs

FSA has a special procedure to help States develop **mediation** services. Under Federal Regulation 7 CFR 1946, FSA officials determine whether a State program meets the following requirements:

1. By August 1 of each year, the Governor or designated State agency head must notify the FSA Administrator of its interest in being certified and eligible to receive matching Federal support funds for the State **mediation** program.

2. **Mediation** services must be provided to agricultural producers, creditors, and other persons

directly affected by USDA actions to help them reach mutually agreeable settlement of their disputes.

3. The program must be authorized or administered by an agency of the State government or by the Governor.

4. Training must be provided for mediators.

5. Confidentiality of the **mediation** process must be assured.

6. All lenders and borrowers of agricultural loans and, in cases of other issues covered by the **mediation** program, persons directly affected by USDA actions must be ensured of adequate notification of the **mediation** services available.

Matching State Grants

If all the conditions are met, the FSA Administrator may certify a State's agricultural **mediation** program and provide matching funds for up to $500,000 or 70 percent (whichever is less) of the operating and administrative costs of the program. These funds are to be used to pay the staff salaries, office expenses, supplies, training, travel, clerical support, and administrative costs necessary to provide **mediation** services.

Matching **mediation** grant funds are processed at the FSA national office by the Director, Advisory and Corporate Operations Staff. This delegation of authority was previously established with the former Farmers Home Administration. The purpose of this delegation was to provide a neutral source of authority separate from the loan making and servicing program staffs.

Grant funds are disbursed quarterly from the national office as States use their funds and request the matching funds. Checks are forwarded by certified mail along with the **mediation** work papers to the FSA State Executive Director (SED) for delivery to the State **mediation** officials.

State Supplemental Mediation Agreement

Once a State's agricultural **mediation** program is certified, the FSA SED jointly develops an agreement with the Governor's State **mediation** officials and other USDA participating agencies. The agreement will describe how the affected agencies will participate in the program. The FSA SED confers with the State Attorney General's office, all affected USDA agencies, farm organizations that are interested in development of the State's certified **mediation** program, and affected departments of State governments, to ensure that all interested parties have an opportunity to participate.

The agreement will contain the essentials of the State **mediation** structure, procedural guidelines, and forms to be used in the **mediation** process. Then it is reviewed by the Regional Office of the General Counsel and submitted to the national office for post approval by the FSA Administrator.

National Performance

The USDA Agricultural **Mediation** Program was cited for efficiency and effectiveness in the Vice President's Report

of the National Performance Review, *Creating a Government that Works Better and Costs Less*. The program was singled out as an example of activity which other Federal agencies could use as a model.

The National Association of State Departments of Agriculture (NASDA) passed a resolution supporting the expansion of agricultural **mediation**. NASDA further urged the expansion of **mediation** to include other Federal agencies which play a role in land and resource management, including the Department of Interior and Army Corps of Engineers.

States participating in the program in 1998 are Alabama, Arizona, Arkansas, Florida, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, Washington, Wisconsin, and Wyoming.

Certified State Mediation Program Contacts

Director
Advisory and Corporate Operations Staff
Agricultural **Mediation** Program
USDA/FSA/ACOS/DIR/AG
STOP 0502
14th & Independence Ave., S.W.
Washington, DC 20250-0502
Tel (202) 690-0490
Fax (202) 690-3003

Chester A. Bailey
Agricultural **Mediation** Program
Room 3099-A, South Building
Washington, DC 20250-050
Tel (202) 720-1471
Fax (202) 690-3003